Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-970

ALTON SONSTEGARD,
Petitioner,

vs.

CITY OF KETTERING,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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and

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

ALTON SONSTEGARD,
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vs.

CITY OF KETTERING,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case on September 9, 1977 affirming the criminal conviction of petitioner by the Municipal Court of the City of Kettering, Ohio, imposing upon petitioner penalty for the exercise of speech and upon which the City of Kettering Municipal Ordinance created a criminal sanction which is repugnant to the Constitution of the United States.

OPINION BELOW

The Supreme Court of Ohio dismissed the appeal of the petitioner on the 9th day of September, 1977, included herein as Appendix A. Said appeal was taken from the adverse ruling of the Court of Appeals of the Second Judicial District of Ohio rendered on the 31st day of March, 1977. The opinion of the Court of Appeals is unreported and included herein as Appendix B. The verdict of the jury in the Municipal Court of the City of Kettering, Criminal Division, is included herein as Appendix C. The judgment of the Municipal Court of the City of Kettering is unreported and appears only as the original dockets and records of that court and is included herein as Appendix D. The affidavit alleging a criminal offense and instituting the criminal process is printed herein as Appendix E.

JURISDICTION

The judgment of the Municipal Court of the City of Kettering, Criminal Division, was entered against the petitioner on the 1st day of July, 1976, convicting him of unlawfully and recklessly causing annoyance to others by communicating unwarranted and grossly abusive language after reasonable warning or request to desist therefrom, in violation of Section 648.04 (a) (2) of the General Offenses Code of the City of Kettering, Ohio. The Court of Appeals of Montgomery County, Ohio for the Second Judicial District affirmed the conviction on the 31st day of March, 1977, upon the reasoning that the ordinance as written and applied was not repugnant to the Constitutions of the

United States or State of Ohio. The Supreme Court of Ohio affirmed the conviction on the 9th day of June, 1977, by dismissing the petitioner's appeal for the reason that no substantial constitutional question existed. The jurisdiction of this court is invoked under 28 U.S.C. §§ 1257 and 2101, and Part V of the rules of this court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and Section 648.04 (a) (2) of the Kettering General Offenses Code are set forth in Appendix F.

QUESTIONS PRESENTED

The constitutional question presented by this Writ of Certiorari as raised in the Municipal Court of the City of Kettering, Criminal Division, by oral motion and written memorandum prior to judgment and was preserved during Appellate review. Said issue is as follows:

> (1) Whether Section 648.04 (a) (2) of the City of Kettering Municipal Ordinance, which provides that "no person shall recklessly cause inconvenience, annoyance, or alarm to another, by...Making..... offensively coarse utterance....or communicating unwarranted and grossly abusive language to any person...," as written, is repugnant

to the First and Fourteenth Amendments to the Constitution of the United States, as vague and overbroad in its restraint upon the freedom of speech.

STATEMENT OF THE CASE

The petitioner was arrested by a Kettering police officer and charged by affidavit with violation of Section 648.04 (a) (2) of the Kettering General Offenses Code on the 15th day of May, 1976. The affidavit reads in pertinent part that "the petitioner, Alton Sonstegard, did unlawfully and recklessly cause annoyance to others by communicating unwarranted and grossly abusive language after reasonable warning or request to desist therefrom." On the 16th day of June, 1976, during the trial, the petitioner made an appropriate motion in the Municipal Court of the City of Kettering, Ohio challenging the constitutionality of Section 648.04 (a) (2) of the Kettering General Offenses Code as overbroad and thereby in violation of the defendant's right of free speech as guaranteed by the First and Fourteenth Amendments to the United States' Constitution. This motion was summarily overruled by the trial court. The jury returned a verdict of guilty thereafter on the same date. On the 12th day of August, 1976, the petitioner was sentenced by the court to pay a fine of Two Hundred Fifty Dollars and costs in the amount of One Hundred Twenty-Eight Dollars and Eighty-Six Cents and was sentenced to jail for a period of thirty days. One Hundred Fifty Dollars of the fine and twenty-nine day of the sentence were suspended on

condition of the petitioner's future good behavior.

The Court of Appeals of Montgomery County, Ohio for the Second Judicial District affirmed the lower court by decision entered on the 31st day of March, 1977, rejecting petitioner's claim that the ordinance was unconstitutional and finding that it was neither vague nor overbroad as written or applied to free speech. The appellate court placed no limiting or narrowing construction upon the wording of the ordinance. On the 27th day of May, 1977, the petitioner filed his appeal with the Supreme Court of Ohio. On the 9th day of September, 1977, the Supreme Court of Ohio dismissed petitioner's appeal for the reason that no substantial constitutional question existed.

REASONS FOR GRANTING WRIT

The instant case involves substantial constitutional issue concerning the State's power to regulate speech in light of the First and Fourteenth Amendments to the United States Constitution. The sensitive standard for legislatively and judicially separating protected from unprotected speech under the Constitution is undeniably one which must be carefully honed and defined yet the task is assisted by voluminous precedent. Both the drafting and the judical interpretation of so called disorderly conduct legislation indistinguishably similar to the subject ordinance has been mandated by the United States Supreme Court through numerous opinions, as cited hereinafter.

The reluctance of the courts of the State of Ohio to follow such decisions is not only baffling but, more importantly, disturbs the roots of our legal system based upon stare decisis. The ordinance in question is indistinguishable from those already struck down by this Court and inexplicably, seems to embody the most repugnant elements of those unconstitutional enactments. As briefly summarized herein, the ruling in the instant case conflicts with all of the applicable decisions of this court.

WHETHER SECTION 648.04 (a) (2) OF THE CITY OF KETTERING MUNICIPAL ORDINANCE, WHICH PROVIDES THAT "NO PERSON SHALL RECKLESSLY CAUSE INCONVENIENCE, ANNOYANCE, OR ALARM TO ANOTHER, BY... MAKING... OFFENSIVELY COARSE UTTERANCE...OR COMMUNICATING UNWARRANTED AND GROSSLY ABUSIVE LANGUAGE TO ANY PERSON..." AS WRITTEN, IS REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS VAGUE AND OVERBROAD IN ITS RESTRAINT UPON THE FREEDOM OF SPEECH.

The affidavit herein charged the petitioner with "unlawfully and recklessly causing annoyance to others by communicating unwarranted and grossly abusive language after reasonable warning or request to desist therefrom" in violation of Section 648.04 (a) (2) of the General Offenses Code of Kettering, Ohio. The foregoing ordinance, contained in its entirety in Appendix F, is patterned verbatim after Ohio Revised Code Section 2917.11, which was enacted in its present

form on January 1, 1974, in an apparent but unsuccessful attempt to comply with the prior rulings of this court. Following a jury trial and the overruling of petitioner's motion to dismiss on the grounds raised herein, the petitioner was convicted as charged.

The specific words uttered by the petitioner, though disputed in the trial court, were not included in the record on appeal. Though the Appellate Court noted the lack of such transcript in justifying its affirmance of petitioner's conviction, it has long been the holding of this court that no such record is required to constitutionally challenge a criminal ordinance on its face. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965), Terminiello v. Chicago, 337 U.S. 1 (1949); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Gooding v. Wilson, 405 U.S. 518, 520 (1972) and Lewis v. City of New Orleans 415 U.S. 130 (1974). It was appropriately stated by this court in Gooding v. Wilson, supra at 520:

> "...it matters not that the words (of petitioner) used might have been constitutionally prohibited under a narrowly and precisely drawn statute, for petitioner may attack an overly broad statute without demonstrating that his own conduct could not be regulated by a more precisely drawn act."

Again in Coates v. City of Cincinnati, supra at 616:

> "It is the ordinance on its face that sets the standard of conduct and warns against transgression.

> The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech."

This principle was reiterated in Lewis v. City of New Orleans, supra and has not been abandoned in subsequent cases. The specific conduct and words involved is thus not relevant to the instant decision.

The subject ordinance seeks to punish the mere utterance of words considered "offensively coarse" or "unwarranted and grossly abusive." The foregoing language, with all its inherently imprecise connotations, has not been legislatively or judically defined by any reported Ohio decision. In fact, the only reported Ohio cases have voided the legislation in its entirety as unconstitutional. City of Akron v. Serra 69 Ohio Ops. 2d 67 (1974); and State v. Hartsing, 72 Ohio Ops. 2d 109 (1975), (both of which were municipal court decisions). In the case at bar the Ohio Second District Court of Appeals in an unreported opinion concluded that a person of ordinary knowledge and sensibilities would know the meaning of the ordinance. In other words, an unwritten standard is divinely shared by all members of society (at least in Ohio) so as to rid the language of this ordinance of any possible vagueness or subjectivism in its application. Needless to say, this court has not succumbed to such reasoning when considering vital First Amendment rights of all citizens.

No limiting construction having been engrafted upon the language of this enactment, it is necessary to determine only whether such language squares with the constitutional guarantee of free speech. The task is greatly simplified in that the appropriate test has remained unchanged since the case of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Stated simply, the regulation of speech must be confined only to that which is clearly unprotected by the First Amendment --i.e. words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Ibid at 572. The "fighting words" test has been followed in all cases and applied to indistinguishable laws of various jurisdictions. See Terminiello v. Chicago supra; Shuttlesworth v. Birmingham, 382 U.S. 87, 90-91 (1965); Cohen v. California 403 U.S. 15, 20 (1971); Bachellar v. Maryland, 397 U.S. 564, 567, (1970); Street v. New York, 394 U.S. 576, 592 (1969); Coates v. City of Cincinnati, supra; Lewis v. City of New Orleans, supra; Rosen v. California 416 U.S. 924 (1974) and Karlan v. City of Cincinnati 416 U.S. 924 (1974). Applying the holding and rationale in the foregoing decisions, the words "offensively coarse utterance" and "unwarranted and grossly abusive language" are clearly overbroad and unconstitutionally vague as potentially repressing freedom of speech.

While the affidavit indicates that the petitioner was given reasonable warning or request to desist such notice does not render the ordinance less vague. For the officer's personal interpretation of the ordinance is immaterial.

Vague laws may trap those who desire to be law abiding by not providing fair notice of that which is prohibited. Karlan v. City of Cincinnati (dissenting opinion of Justice Douglas), supra, p. 924; Papachristou v. City of Jacksonville 405 U.S. 157, 162 (1972) and United States v. Harriss, 347 U.S. 612, 617 (1954).

The subject ordinance is again facially defective in its sweeping prohibition of words or conduct merely "causing inconvenience, annoyance or alarm to another". As held in numerous prior decisions, mere annoyance, inconvenience or alarm is an improper area for prohibitive legislation. As relevantly stated in Coates v. City of Cincinnati, supra, at 614:

> "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."

This court noted that a city is free to prevent people from engaging in certain antisocial conduct but it can do so only through enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited, not where a violation may depend upon whether or not a policeman is annoyed. Ibid., page 614. In this regard, the court well expressed its opinion in Terminiello v. Chicago, supra at page 4 as follows:

> "Accordingly, a function of free speech under our system of government is to invite dispute...speech is often provocative and challenging... that is why freedom of speech, though not absolute...is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. (emphasis added)

The Supreme Court of Alaska followed this court's teachings in Marks v. Anchorage, 500 Pac. 2d 644 (1972), wherein a disorderly conduct ordinance almost identical in wording to the subject ordinance was voided for vagueness. Pertinently, the court found that the prefatory language contained in the ordinance (i.e. "recklessly causing inconvenience, annoyance or alarm to another") was of itself impermissibly vague.

A thorough chronology of cases in the subject area of the law has been set forth in the dissenting opinion of Justice Douglas in Karlan v. City of Cincinnati, supra pp. 924-932. Justice Douglas traces the decisions from Chaplinsky v. New Hampshire, supra through Lewis v. City of New Orleans, supra, noting that the "fighting words" test has been reaffirmed by this court since 1942. As scrutinized in light of the well delineated judical standards in this field of legislation, the instant ordinance cannot withstand constitutional attack.

The Ohio courts have demonstrated an obvious propensity to ignore the teachings of this court even though under an equal duty with the federal courts to protect federal rights. See Public Service Comm'n v. Wycoff Co., 433 U.S. 237, 247 (1952). Justice Douglas correctly noted, however, that the state courts have consistently shown either an inability or unwillingness to apply the instructions of this court. Karlan v. City of Cincinnati, supra at 928. The present case serves to justify these concerns and echoes the futility in remanding this case for further consideration by the courts of Ohio.

Three years have passed since Karlan v. City of Cincinnati, supra, and its simple, precise, and understandable language. It certainly answered any possible confusion which may have remained in Ohio at that time.

It is not reassuring to realize that in the passing years Ohio has not stricken down its vague and overbroad statute and still permits similar city ordinances to exist, and that appeals are struck down in unreported cases and dismissed for want of a constitutional question by its highest court. The frightening aspects of such purposeful failure by the Ohio Judiciary to protect the Federal Constitution creates grave concern for the future. Such challenging words as these could only be written in a free and constitutionally protected society. Such words should be written when a geniune and ominous fear of the suppression of the right of free speech exists.

CONCLUSION

For all of the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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(513-228-2928)

Attorneys for Petitioner

APPENDIX A

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus.	1977 Term To wit: September 9, 1977
City of Kettering, Appellee,	No. 77-608
vs.	
Alton Sonstegard, Appellant.	APPEAL FROM THE COURT OF APPEALS FOR MONTGOMERY COUNTY

This cause, here in appeal as of right from the Court of Appeals for Montgomery County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Montgomery Court for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 30th day of September, 1977.

/s/ Thomas L. Startzman. . . . Clerk
/s/ Sam Adkins . . . . . .Deputy

APPENDIX B

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

STATE OF OHIO
Plaintiff-Appellee

vs. Case No. 5292

ALTON SONSTEGARD
Defendant-Appellant

OPINION

Rendered on the 31st day of March, 1977.

John T. Shanks & Richard S. Sutton,
Attorneys at Law, 1100 Gem City Bldg.
Dayton, Ohio 45402 Attorneys for
Defendant-Appellant

Jay Newberry, City of Kettering Prosecutor,
3600 Shroyer Road, Kettering, Ohio
45429 Attorney for Plaintiff-Appellee

KERNS, J.

The defendant, Alton Sonstegard, was tried by jury in the Kettering Municipal Court and found guilty of "communicating unwarranted and grossly abusive language" in violation of Section 648.04 (A) (2) of the Ordinances of the City of Kettering, Ohio.

During the course of the trial, Sonstegard moved for a dismissal of the charge against him on the ground that Section 648.04 (A) (2) is

unconstitutionally overbroad in that it embraces words that are protected by the First Amendment to the United States Constitution, and the overruling of the motion to dismiss provides the basis for the only assignment of error alleged in this appeal.

The disorderly conduct ordinance in question is identical to Section 2917.11 (A) (2) of the Ohio Revised Code and reads as follows:

> "No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:
>
> **********
>
> (2) Making unreasonable noise or offensively coarse utterance, gesture, or display, or communicating unwarranted and grossly abusive language to any person;
>
> **********

For many years, the constitutionality of an overbroad ordinance was properly judged in terms of the result reached by its application to the facts of a particular case, but in a comparatively recent case, the Supreme Court of the United States has held that an enactment which encroaches upon first amendment values may be declared void on its face. Gooding v. Wilson, 405 U.S. 518. See also, Lewis v. New Orleans, 415 U.S. 130.

Ordinances similar to the one under consideration have already met hard times. Akron v. Serra, 40 Ohio Misc. 14; State v.

Hartsing, 43 Ohio Misc. 1. But the Supreme Court of the United States has recognized the power to constitutionally punish words which by their very utterance tend to incite an immediate breach of the peace, and we are not convinced that an offensively coarse utterance or grossly language can comfortably be suited to any other purpose.

The nebulous character of such words as "coarse" and "abusive" must be calibrated by human sensibilities and such words thus provide too much roving room for constitutional validity, but when these adjectives are attended by such excisive words as "offensively" and "grossly", we are of the opinion that the narrowing process results in the "fighting words" which are not proscribed by the constitutional guarantee of freedom of speech.

Almost everyone should have some realistic notion of what constitutes unwarranted and grossly abusive language, and the suggestion that the words encompassed thereby, when directed to another person, would not tend to cause a breach of the peace requires beatific vision, supreme blessedness, and rare imagination.

Accordingly, the alleged error is overruled, and the judgment will be affirmed.

SHERER, F. J. and McBRIDE, J. concur.

. . . . . .

McBRIDE, J., concurring:

I concur in the affirmance because in the absence of any record of the trial proceedings the statements appellant used and the circumstances under which they were made are not before this court. The conclusions in the affidavit do not furnish facts nor do they foreclose amendments to the specific charge which could have expanded the constitutional inquiry beyond the points argued in the briefs.

While the appeal is from the judgment and sentence the only error assigned is from a preliminary denial of a motion to dismiss, which is not in itself enlightening or final. In earlier decisions I questioned the language limitations of Revised Code 2917.11 (A) (2) and I continue to share such misgivings of portions of the subsection; however, foreseeable situations under the causing alarm portion prevents rash judgment that the subsection is totally and facially unconstitutional. I have yet to find a case that refutes Justice Holmes statement that there is no constitutional right to falsely yell "fire" in a crowded theatre. The total vacuum of facts in this case is not a suitable posture for a decision worthy of the constitution.

. . . . . .

APPENDIX C

IN THE KETTERING MUNICIPAL COURT
KETTERING, OHIO

CITY OF KETTERING : Case No. 76CR 541B
Plaintiff,
:
vs. JUDGMENT ENTRY
:
ALTON M. SONSTEGARD
Defendant. : July 1, 1976
: : : : : : : : : : : : : : : : : : :
Moore, L.

This matter coming before the Court for trial to a jury on the 16th day of June, 1976, the Defendant being charged with Disorderly Conduct, a fourth degree misdemeanor; and the jury having duly returned a verdict of guilty as charged.

The Court does accept said verdict and orders the same entered as a matter of record. The matter of sentencing shall be continued until such time as the Court shall schedule in the future.

APPROVED:

/s/ Larry W. Moore
Honorable Larry W. Moore, Judge

cc: Mr. Jay Newberry
Prosecutor

Mr. John T. Shanks
Attorney for Defendant

APPENDIX D

IN THE KETTERING MUNICIPAL COURT
KETTERING, OHIO

CITY OF KETTERING : Case No. 76CR 541B
Plaintiff,
:
vs. JUDGMENT ENTRY
:
ALTON M. SONSTEGARD
Defendant : August 12, 1976
: : : : : : : : :
Moore, L.

This matter coming before the Court for sentencing, the Defendant previously having been found guilty in a trial before a jury in this Court on the 16th day of June, 1976; said verdict having subsequently been journalized on the 1st day of July, 1976.

It is the order of this Court that the Defendant shall pay a fine in the sum of $250.00 plus costs in the amount of $128.86. The Court further orders that the Defendant be incarcerated in the Kettering City Jail for a period of thirty days.

Upon further consideration, the Court does order that on condition of future good behavior, $150.00 of the fine be suspended and twenty-nine days of the sentence of incarceration be suspended.

It further appearing to the Court that the Defendant herein has indicated that he will perfect an appeal in this matter, and the Court being of the opinion that no appeal bond is necessary. It is the order of this Court that the execution of the sentence imposed shall be stayed until such time as the appeal is completed.

APPROVED:

/s/ Larry W. Moore,
Honorable Larry W. Moore, Judge

cc: Mr. Jay Newberry
Prosecutor

Mr. John T. Shanks
Attorney for Defendant

APPENDIX E

KETTERING MUNICIPAL COURT

THE STATE OF OHIO)
Montgomery County) ss.
City of Kettering)

Before me, Morris M. Lyons, a notary public in and for the County of Montgomery, State of Ohio, aforesaid, personally came K.R. Castor, who being duly sworn according to law, deposeth and saith that on or about the 15th day of May A.D., 1976, in the City of Kettering, and in the State of Ohio, one Alton M. Sonstegard of 4473 Bascule Bridge Dr. Apt. 622, did unlawfully and recklessly cause annoyance to others by communicating unwarranted and grossly abusive language after reasonable warning or request to desist therefrom, Contrary to the form of the ordinance to-wit: Section 648.04 (A) (2) of Kettering, Ohio, in such cases made and provided and that said Alton M. Sonstegard is guilty of the fact charged; and further this deponent saith not.

Sworn to and subscribed before me by the said K.R. Castor in the City of Kettering and County of Montgomery and State of Ohio, this 15th day of May, A.D. 1976.

/s/ K.R. Castor

By /s/ Morris M. Lyons
My commission expires
6/16/76

APPENDIX F

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

SECTION 648.04 (a) (2) KETTERING GENERAL OFFENSES CODE

§§ 648.04 DISORDERLY CONDUCT

(a) No person shall recklessly cause inconvenience, annoyance or alarm to another, by doing any of the following:

(2) Making unreasonable noise or offensively coarse utterance, gesture or display, or communicating unwarranted and grossly abusive language to any person;

Whoever violates this section is guilty of disorderly conduct, a minor misdemeanor. If the offender persists in disorderly conduct after reasonable warning or request to desist, disorderly conduct is a misdemeanor of the fourth degree. Punishment shall be provided... not more than Two Hundred Fifty Dollars ($250.00)...not more than thirty days.